

February 8, 2012

Chia-Chi Wang
27395 Echo Canyon Court
Corona, CA 92882

Re: Your Request for Informal Assistance
Our File No. I-11-243

Dear Ms. Wang:

This letter responds to your request for advice regarding conflict of interest provisions of the Political Reform Act (the “Act”).¹ We base this letter on the facts presented. The Fair Political Practices Commission (the “Commission”) does not act as a finder of fact when it renders assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

Additionally, our advice is based solely on the provisions of the Act. We offer no opinion on the applicability, if any, of other conflict of interest laws such as Government Code Section 1090, or your agency’s statement of incompatible activities.

Because your inquiry is general in nature and does not involve a specific decision, we will treat your letter as a request for general information.²

QUESTIONS

1. As a current state employee and business owner, may your company, Dynamic Engineering Services, Inc. (“DESI”) bid on contracts administered by your agency, the state Department of Transportation (“DOT”) or any other state agency?

2. May your company bid on contracts or team up with larger consulting firms to bid on contracts administered by your agency or other public agencies (such as cities, counties, or other transportation agencies)?

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

² Informal assistance and general information letters do not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

3. May your company serve as a sub-consultant with any of the five consulting firms that currently have contracts with your agency?

CONCLUSION

1. Your company may bid on contracts before your agency. However, you may not participate in making, or influencing any decision before your agency involving any potential contracts involving DESI, from which you receive income or other sources of income that come before the DOT.

DESI may also team up with larger consulting firms and bid on contracts before your agency. However, you may not participate in making or influence decisions before your agency involving these contracts if it will result in an increase or decrease in your business entity's gross revenues for a fiscal year in the amount of \$20,000 or more; or, if the decision will result in DESI incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of \$5,000 or more; or an increase or decrease in the value of DESI's assets or liabilities of \$20,000 or more.

2. Your company may bid on contracts or team up with larger consulting firms to bid on contracts administered by other public agencies. However, you may not "influence" these decisions by purporting to act on behalf of, or as the representative of, your agency to any member, officer, employee or consultant of the agency.

3. Your company may serve as a sub-consultant with any of the five consulting firms that currently have contracts with your agency. However, you may not participate in implementation of these contracts in any way. See discussion below.

FACTS

You are a Supervising Transportation Engineer with the DOT. You have been with the DOT since 1989, and you were promoted to your current position in 2002. Your current position is the Area Construction Manager with the Division of Construction in District 8, which includes both San Bernardino and Riverside Counties. You are one of three Area Construction Managers. Each manager is responsible for a geographic area within the district. You are responsible for construction projects within Western Riverside County and Big Bear Mountain areas. Your position is designated in your department's conflict of interest code.

As an Area Construction Manager, your essential responsibility is construction contract administration. Your duties include assuring the proper development, allocation, and use of resources to administer contracts. You also direct and advise field seniors on complex contract change orders and claim resolutions, as well as implement the department's policies and procedures, ensure environmental compliance and delivery of the construction program within budget and on time.

While you are in charge of administering contracts within your division, your duties do *not* include approving or awarding any contracts that come before your agency.

The construction division currently has five consultant contracts at various amounts and contract durations. These contracts have different tasks and service different areas within the division.

You and your husband have established your own business, DESI, a professional construction management consulting company in late 2008. You are co-owner of DESI, which provides construction inspection services to project owners including cities, counties and other transportation agencies. DESI participates in contracts as sub-consultant to a larger consulting firm. Your firm specializes in electrical related inspection services such as signal and lighting systems, ramp metering systems, communication and Fiber Optic systems.

As a current state employee with managerial capacity in a division that utilizes consultant services, you wish to know what limitations the Act imposes on you as a state employee and business owner if your company bids on contracts or teams up with a larger consulting firm to bid on a contract administered by the DOT or any other state department. You also wish to know if your company may bid on contracts or team up with larger consulting firms to bid on contracts administered by other public agencies such as cities, counties, or other transportation agencies. Lastly, you wish to know if your company may serve as a sub-consultant to the five consulting firms that currently have contracts with your agency.

ANALYSIS

The Act's conflict of interest provisions ensure that public officials will "perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them." (Section 81001(b).) Section 87100 prohibits any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest.

The Commission has adopted an eight-step standard analysis for deciding whether an official has a disqualifying conflict of interest. (Regulation 18700(b).) The general rule, however, is that a conflict of interest exists whenever a public official makes a governmental decision that has a reasonably foreseeable material financial effect on one or more of his or her financial interests.

Step One: Are you a "public official?"

The Act's conflict of interest provisions apply only to "public officials." (Sections 87100, 87103; Regulation 18700(b)(1).) A "public official" is "every member, officer, employee or consultant of a state or local government agency" (Section 82048.) As an Area

Construction Manager with the DOT who is also designated in that state agency's conflict of interest code, you are a public official under the Act.

Step Two: Are you making, participating in making, or influencing a governmental decision?

A public official "makes a governmental decision" when the official, acting within the authority of his or her office or position, votes on a matter, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency. (Regulation 18702.1.)

A public official "participates in a governmental decision" when, acting within the authority of his or her position and without significant intervening substantive review, the official negotiates, advises, or makes recommendations to the decision-maker regarding the governmental decision. (Regulation 18702.2.)

A public official is attempting to use his or her official position to "influence" a decision if, for the purpose of influencing, the official contacts or appears before any member, officer, employee, or consultant of his or her agency or any other agency appointed by or subject to the budgetary control of his or her agency. (Regulation 18702.3.)

Your facts indicate that while you are in charge of administering contracts within your division, your duties do *not* include approving or awarding any contracts that come before your agency. Therefore, you would not be making decisions regarding contract approval or awards before your agency. With regard to other agencies—local, city, county and other state agencies, you would not be making decisions regarding contracts either as these decisions would not come before you as a public official.

However, you would be participating in making or influencing a governmental decision should you take part in contract approval or awarding before your agency by making recommendations, contacting or appearing before any member, officer, employee or consultant of your agency regarding the approval or awarding of any contracts to your firm or any other firm in which you have a financial interest.

You would also be "influencing" a governmental decision if you attempt to use your official position to influence a decision if you act or purport to act on behalf of, or as the representative of, your agency to any member, officer, employee or consultant of another agency. (Regulation 18702.3(b).)

You would be participating in making or influencing a governmental decision if you take part in the implementation of an existing contract in which your company has joined the contract as a sub-consultant to a larger consulting firm.

Step Three: What are your economic interests?

A public official has a financial interest in a decision within the meaning of Section 87103 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family, or on any one of five enumerated economic interests. (Section 87103; Regulations 18703-18703.5.)

The applicable economic interests include:

- An interest in a business entity in which a public official has a direct or indirect investment of \$2,000 or more. (Section 87103(a), Regulation 18703.1(a).) An interest in any business entity in which a public official is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(d), Regulation 18703.1(b).)
- An interest in real property in which a public official has a direct or indirect interest of \$2,000 or more. (Section 87103(b), Regulation 18703.2.)
- Any source of income, including promised income, to the public official that aggregates to \$500 or more within 12 months prior to the decision. (Section 87103(c), Regulation 18703.3.)
- Any source of gifts to the public official if the gifts aggregate to \$420 or more within 12 months prior to the decision. (Section 87103(e), Regulation 18703.4.)
- A public official also has an economic interest in his or her personal expenses, income, assets, or liabilities, as well as those of his or her immediate family. This is also known as the “personal financial effects” rule. (Section 87103, Regulation 18703.5.)

Investment and Business Position – Business Entity – DESI:

Your facts indicate that you have an economic interest in your construction consulting business DESI if you have a direct or indirect investment in the business of \$2,000 or more. Furthermore, as a co-owner or partner of the company, you have an economic interest in your business position with DESI.

You are also a state employee and derive income from the DOT. However, since the DOT is a government agency, this source of income falls under the “government salary exception,” and therefore is not a source of conflict for you due to the income you receive from the agency.

Source of income – DESI and customers

If you receive annual income of \$500 from DESI, you have a source-of-income economic interest in the business. In addition, since you own more than 10 percent of the business, and any sources of income of the business in which your pro rata share is \$500 or greater, such as your clients, is also considered a source of income.³

Personal Finances:

Additionally, you also have an economic interest in your personal finances if the decision will result in an increase or decrease in your “personal expenses, income, assets, or liabilities.” (Section 87103.)

Four: Are Your Economic Interests Directly or Indirectly Involved in the Governmental Decision?*Business Entity, Source of Income:*

A person, including business entities, sources of income, and sources of gifts, are directly involved in a decision before an official’s agency when that person, either directly or indirectly or by an agent:

“(1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or;

“(2) Is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official’s agency. A person is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person.” (Section 87103; Regulation 18704.1(a).)

If the official’s interest in a business entity, source of income or source of a gift is not directly involved in a decision before the official’s agency, they are deemed to be indirectly involved. (See *Cooke* Advice Letter, No. A-99-127.)

Directly Involved Business Entity:

Your facts indicate that your company may bid on state contracts with your agency or other state and local agencies. If so, your company would be directly involved in these decisions as it would be initiating a proceeding or would be a named party, or the subject of a proceeding.

³ You have not asked about effects on any sources of income to your business, therefore we do not further analyze these interests.

Indirectly Involved Business Entity:

You also indicate that your company may team up with larger consulting firms as a sub-consultant. If your company does not initiate, or is not named in the bidding process, then it would be indirectly involved in the decisions.

Personal Finances:

For governmental decisions that affect personal expenses, income, assets, or liabilities, the standards set forth in Regulation 18704.5 apply. Regulation 18704.5 states:

“(a) A public official or his or her immediate family are deemed to be directly involved in a governmental decision which has any financial effect on his or her personal finances or those of his or her immediate family.”

Therefore, your personal finances would be deemed directly involved if the decisions would have *any* effect on your personal finances or those of your immediate family.

Step Five: Applicable Materiality Standard.

A conflict of interest may arise only when the reasonably foreseeable impact of a governmental decision on a public official’s economic interest is material. (Section 87103; Regulation 18700(a).) Different standards apply to determine whether reasonably foreseeable financial effect on an economic interest is material.

Directly Involved Business Entity, Source of Income:

Where a source of income is *directly involved* in a decision before an official’s agency, the financial effect of the decision is deemed material. This presumption may be rebutted by proof that it is not reasonably foreseeable that the governmental decision will have *any* financial effect on the business entity—not even a penny’s worth. (Regulation 18705.3(a).)

Indirectly Involved Business Entity, Source of Income:

Whether the financial effect of a governmental decision on an indirectly involved business entity is material depends on the size of the business entity. The standards vary according to whether the business entity is a Fortune 500 company, is listed on the New York Stock Exchange, American Stock Exchange, or NASDAQ, or according to the size of the business entity. For purposes of this analysis, we assume that DESI is a small business that is not a Fortune 500 company or listed on any of the major exchanges. The following table summarizes the standard for small businesses:

Regulation 18705.1(c)(4) (enclosed) sets the materiality standard for indirectly involved small business entities such as DESI:

“(4) ... the financial effect of a governmental decision on the business entity is material if it is reasonably foreseeable that:

“(A) The governmental decision will result in an increase or decrease in the business entity’s gross revenues for a fiscal year in the amount of \$20,000 or more; or,

“(B) The governmental decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of \$5,000 or more; or,

“(C) The governmental decision will result in an increase or decrease in the value of the business entity’s assets or liabilities of \$20,000 or more.”

Personal Finances:

A reasonably foreseeable financial effect on a public official’s personal finances is material if it is at least \$250 in any 12-month period.

However, when determining whether a governmental decision has a financial effect on a public official’s economic interest in his or her personal finances, neither a financial effect on the value of real property owned directly or indirectly by the official, *nor a financial effect on the gross revenues, expenses, or value of assets and liabilities of a business entity in which the official has a direct or indirect investment interest shall be considered.* (Regulation 18705.5(a).)

Step Six: Is it Reasonably Foreseeable That the Financial Effect of the Governmental Decision Upon Your Economic Interests Will Meet the Applicable Materiality Standard?

Foreseeability:

Whether the financial consequences of a decision are reasonably foreseeable at the time a governmental decision is made depends on the facts of each particular case. A financial effect need not be a certainty to be considered reasonably foreseeable; a substantial likelihood that it will occur suffices to meet the standard. On the other hand, if an effect is only a mere possibility, it is not reasonably foreseeable. (*Ibid.*) Please note that the Commission does not act as a finder of fact when providing advice. (*In re Oglesby* (1975), *supra*.)

Directly Involved Business Entity, Source of Income:

Regulation 18705.3 provides that “any reasonably foreseeable financial effect on a person who is a source of income to a public official, and who is directly involved in a decision before the official’s agency, is deemed material.” This standard for determining materiality for a

directly involved source of income is known as the “one penny” rule. If the source of income is affected by even one penny, the financial effect is deemed material.

If a decision involving DESI comes before your agency or any other agency and you “participate” or “influence” the decision, we find this standard will likely be met. Therefore, unless you can rebut this presumption, you may not participate in making, or influence any decision before your agency or other agencies involving any potential contracts involving DESI, from which you receive income or other sources of income that come before the DOT.

If a decision comes before another agency involving DESI, you may not “influence” the decision by attempting to use your official position by purporting to act on behalf of, or as the representative of, your agency to any member, officer, employee or consultant of the agency.

Indirectly Involved Business Entity, Source of Income:

Without specific details regarding an upcoming decision and its financial impact on DESI, we cannot provide detailed guidance as to when it is reasonably foreseeable that the above materiality standards will be met with regard to your economic interest in DESI or a particular bid involving a larger consulting firm in which DESI wishes to be a sub-consultant.

For instance, if the successful bid involves a larger consulting firm that has already chosen DESI as one of its sub-consultants for a given project and the decision will have a financial effect on DESI’s gross revenues of \$20,000 or more, or result in incurring or avoiding additional expenses or reducing or eliminating expenses of \$5,000 or more in a fiscal year, then it is reasonably foreseeable that the above materiality standards will be met. You would, therefore, be prohibited from participating in or influencing that decision.

However, the Commission cannot make the determination of foreseeability. Ultimately, the determination of whether or not it is reasonably foreseeable that the materiality standard will be met is a factual question for you to decide.

Step Seven: The Public Generally Exception.

Even if a public official otherwise has a conflict of interest, he or she may still be able to take a role in the governmental decision if the reasonably foreseeable material financial effect of the decision on the official’s economic interest is indistinguishable “from its effect on the public generally.” (Section 87103; Regulations 18700(b)(7), 18707(a).) This rule is referred to as the “public generally” exception. You have not presented any facts indicating that this exception is applicable to your situation; therefore we do not address it here.

Step Eight: “Legally Required Participation” Exception

The “legally required participation” rule applies when the official’s participation in a governmental decision is legally required. (Section 87101; Regulation 18708.) You have not

presented any facts indicating that this exception is applicable to your situation, therefore we do not address it here.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Emelyn Rodriguez
Counsel, Legal Division

ER:jgl

Enclosure